

**MISCONDUCT VERSUS INCAPACITY**

The key difference between misconduct and incapacity:

1. Misconduct

This involves, the intentional, or negligent breaking of work place rules. The employee breaks a rule in circumstances where he or she could have complied, but either refused or failed to do so.

Determining whether an employee is guilty of misconduct or not depends on whether the following questions can be answered in the affirmative:

- does the rule that has allegedly been broken actually exist;
- was the employee aware of the rule, or is the rule so well-known or obvious that the employee ought to have known about it;
- has the rule been applied consistently;
- is the rule valid or reasonable and has been broken by the employee, either deliberately or negligently;
- dismissal must be an appropriate sanction for the breach of the rule.

Rules can originate from a number of sources:

- the employment contract;
- an agreement between the employer and a trade union;
- legislation (e.g. health and safety rules);
- it may be found in the common law ( this essentially includes all legal rules not found in legislation and covers things such as the employee's duty to obey lawful instructions; the duty of good faith and honesty; the duty to cooperate with the employer; and the duty to do the job with reasonable care and skill).

While there are certain rules that are fairly obvious and, strictly speaking, need not even be mentioned in disciplinary codes, e.g. the prohibition against theft or assault, or absence without leave, it is good practice to include all rules applicable to a workplace in a document of some kind. The important thing is that rules should be documented to avoid any uncertainty regarding their existence.

Remember it is the employer who must prove that the rule exists, that the rule is valid and reasonable and that dismissal was appropriate as a sanction.

2. Incapacity

This concerns an employee not able (not unwilling) to do what expected of him or her.

Grogan<sup>1</sup> states *“It is important to distinguish between incapacity that arises from misconduct or wilful negligence and capacity caused by circumstances beyond the employee’s control. The former can be treated as a disciplinary offence. The latter requires different and more sympathetic treatment. ‘No-fault’ incapacity can arise from a variety of causes, including illness, technological change, and incompatibility. In all these cases, the basic principle is that employees should be timeously informed of their deficiencies, be told how to rectify them and be given a reasonable opportunity to improve before any action is taken against them”*.

Thus, it is clear, there must be an investigation before any action is taken against an employee for incapacity/poor work performance. Such an investigation will be in two stages. Firstly, to determine whether the poor performance came about through misconduct on the employee’s part, if so, then the employee may be disciplined for misconduct. Secondly, if the poor performance is not for reasons of misconduct, the investigation must then be geared towards determining the true reason, this may be for any one of a number reasons including inadequate training, or the employee having been promoted to a post above his level of competence.

An employer who knowingly appoints a person to a position for which he or she is unqualified or unsuited will be required to take more extensive remedial steps than would otherwise be required before dismissing the employee.<sup>2</sup>

### **RECOMMENDED PROCESS**

- Standards should be linked to the job and skills profile.
- Work standards should be defined and communicated.
- Fair procedure must be followed.
- Management of poor performance should be in a progressive manner, with the aim of monitoring performance and correcting the unsatisfactory or inferior performance.
- Sufficient proof of poor performance through objective assessment of the performance in the position is necessary.
- Determine whether underlying health or injury problems exist or whether environmental issues are causing impaired performance.
- Appropriate evaluation, instruction, guidance and counselling should be given to employees, together with a reasonable period of time for improvement.
- An investigation should be undertaken to establish the reasons for the unsatisfactory performance and a counselling meeting/series of meetings held:
  - State the area(s) of inadequate performance, in relation to designated duties;
  - request a response from the employee;
  - discuss means of rectifying the performance problem;

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<sup>1</sup> Workplace Law, fifth edition

<sup>2</sup> Buthelezi v Amalgamated Beverage Industries [1999] 9 BLLR 907 (LC)

- jointly compile a plan with targets and time periods for their achievement;
- set a date for the next meeting, incorporating a sufficient time period for improvement and other measures to be taken;
- make the employee aware of consequences of non-improvement;
- implement measures such as training which will assist in resolving the problem.
- Consideration should be given to alternative measures to dismissal to remedy the matter;
- In this process the employee should be given the right to be heard and to be assisted by a union representative or co-employee;
- Should poor performance persist, discipline should be implemented, culminating in a disciplinary enquiry;
- Investigate the facts;
- Suspend the employee with pay, if necessary, pending the outcome of the disciplinary enquiry;
- Establish the appropriate charge;
- Give notification of the disciplinary enquiry to the employee;
- Compile evidence (documentation etc.);
- Hold enquiry.

Comprehensive records must be kept of all meetings and discussion, as these records will be required at the CCMA. In addition records of all training given must be retained as this will assist in the employer proving the fairness, and are required for the employer's Employment Equity report.

Remember, in terms of the Labour Relations Act, all the employee has to prove is that a dismissal took place, thereafter, the onus is upon the employer to prove the dismissal was substantively fair (fair and valid reason) and procedurally fair (fair procedures were followed).